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## QUESTION PRESENTED

Whether—in a case where it is determined that the government's underlying action was not substantially justified and the government is therefore liable for fees under the Equal Access to Justice Act—the prevailing party is entitled to an award of reasonable attorney's fees for defending its fee application without a second, separate inquiry into whether the government's litigation position in the fee litigation was substantially justified.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**No. 89-601**

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GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

*Petitioners,*

—v.—

MARIE LUCIE JEAN, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## BRIEF FOR THE RESPONDENTS

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## STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1982 & Supp. V 1987), provides in relevant part, in addition to those sections cited in Petitioners' Brief ("Pet. Br.") at 2-3:

> (1)(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an

itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

• • • •

(2)(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings[.]

## STATEMENT

Congress enacted the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("EAJA"), to enable persons affected by unjustified governmental action to seek redress undeterred by the prohibitive cost of litigation:

> The purpose of the Equal Access to Justice Act is to reimburse individual[s] who successfully litigate against federal bureaucracy. This will force Government agencies to be responsible for their conduct and will provide those with modest means with access to the courthouse door.
>
> • • • •
>
> They say that "You can't fight city hall," and the prevailing attitude of many today is that even if you do fight the Federal Government and win in court, you still lose because of the cost. We must eliminate the possibility of such Pyrrhic victories. . . . Equal justice is not available when one cannot afford to fight.

131 Cong. Rec. S9997-S9998 (daily ed. July 24, 1985) (statement of Sen. Domenici). EAJA fulfills this purpose by providing an award of "fees and other expenses" to private litigants of limited means who prevail in litigation against the government "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A).

In 1985 Congress found that government litigators were using EAJA's "substantial justification" eligibility threshold to nullify the effect of the statute by arguing that the relevant inquiry was into the government's litigation position. *See* H.R. Rep. No. 120, 99th Cong., 1st Sess. 8-14, 17, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 136-43, 145-46. Congress therefore amended EAJA to require the court to consider the underlying agency act or omission when determining "substantial justification" by defining "position of the United States" to mean "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D).

Congress stated that "the amendment will make clear that the Congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation, and the agency then rides to avoid such liability by reasonable behavior during the litigation." H.R. Rep. No. 120, *supra* at 11. The government nonetheless now seeks a ruling that a critical component of EAJA fees—fees for defending the fee

petition—may be defeated solely by the assertion of a "reasonable" litigation position.

### A. The Facts Giving Rise to the Fee Petition[1]

The government's passing reference to the agency act underlying this litigation as a "response to an influx of undocumented excludable aliens from the Caribbean region" (Pet. Br. at 4) warrants some elaboration. This "response," which commenced during the week of June 1-5, 1981, was a revolution in existing policies and procedures for Haitian refugees seeking asylum in the United States in at least two significant aspects. *Jean v. Nelson*, 711 F.2d 1455, 1462 (11th Cir. 1983).[2]

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1 Petitioners' opening brief, as discussed in the text, reformulates the narrow issue on which certiorari was sought, incompletely recites facts as to matters on which review was expressly not sought, and does not recite essential facts from the actual record in this case—as to the fee award in issue and the proceedings below—which make its academic parade of horribles and claimed policy needs hypothetical and insubstantial. Accordingly, we divide our Statement into facts as to the merits, facts concerning the determination on the fee award in the district court, and facts as to the appeal from the fee award.

2 The numerous opinions in this case referred to herein are: *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981) (on motion for preliminary injunction) ("*Jean I*"); *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982) (after trial) ("*Jean II*"); *Jean v. Nelson*, 683 F.2d 1311 (11th Cir. 1982) (on motion for stay pending appeal) ("*Jean III*"); *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983) (on appeal to the Eleventh Circuit) ("*Jean IV*"); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (on rehearing *in banc*) ("*Jean V*"); *Jean v. Nelson*, 472 U.S. 846 (1985) (on writ of certiorari to the Court of Appeals for the Eleventh Circuit) ("*Jean VI*"); *Louis v. Nelson*, 624 F. Supp. 836 (S.D. Fla. 1985) (regarding entitlement to fees) ("*Jean VII*"); *Louis v. Nelson*, 646 F. Supp. 1300 (S.D. Fla. 1986) (regarding amount of fees) ("*Jean VIII*"); *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988) (on appeal of fee award) ("*Jean IX*"). *Jean VII*, *Jean VIII*, and *Jean IX* are reprinted in the Petitioners' Appendix ("Pet. App.") at 1a-99a. Evidence adduced at trial may be found in the record ("R. at _____") and plaintiffs' exhibits ("PX _____"). Portions of the record on fees are contained in a ten-volume appendix to respondents' brief in the Court of Appeals ("_____ Resp. C.A. Br. App., Tab _____"). The proceedings in this Court are the



First, the government subjected Haitians to an unprecedented exclusion procedure, under which the INS immediately served asylum applicants with notice to appear for exclusion hearings in a manner designed to cut off their otherwise existing right to claim asylum before district directors and, effectively avoiding the district directors, then held mass exclusion hearings that prevented individual representation of applicants. (Memorandum of INS Acting Commissioner, PX 94; J. App. at 89-96). INS officials held these hearings behind locked courtroom doors and deliberately routed Haitians being brought to the INS courtroom from the detention center through back stairwells and immigration offices at a double-time pace to avoid lawyers known to be waiting in public areas of the courthouse to provide the Haitians with free legal assistance. (R. at Vol. 45, pp. 1596-98.) "Many hearings were held behind locked doors in courtrooms from which counsel attempting to inform the Haitians of their rights were barred. Overwhelming evidence established that Creole translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights." *Jean IV*, 711 F.2d at 1462-63; *see also Jean I*, 530 F. Supp. at 926-28.[3]

Second, the government abruptly reversed a policy that had been followed for nearly thirty years by instituting a program of prolonged incarceration for Haitians awaiting political asylum hearings. *Jean II*, 544 F. Supp. at 983.[4] Pursuant to this

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Petition for Writ of Certiorari ("Pet."), Petitioners' Appendix ("Pet. App."), Petitioners' Reply Memorandum ("Pet. Rep."), Petitioners' Brief herein ("Pet. Br."), and the Joint Appendix ("J. App.").

3 For the past six years the government has repeatedly stated that the panel opinion in *Jean IV* was "vacated" when rehearing *in banc* was granted (*see, e.g.*, Pet. Br. at 6) without informing this or any other court that the *in banc* court expressly adopted the factual findings of the panel. *See Jean V*, 727 F.2d at 962; *see also Jean IX*, Pet. App. at 4a n.2 ("[T]he granting of rehearing in banc vacated the panel opinion. . . . The in banc court, however, adopted the panel and district court statements of the facts.").

4 From 1954 until the change of policy, the INS paroled all aliens pending a determination of their admissibility unless the alien was likely to abscond or posed a threat to national security. *Jean VI*, 472 U.S. at 849.

new policy, the INS shipped Haitians from Florida, where they were already represented by immigration lawyers, to federal prisons and INS detention facilities located in "desolate, remote, hostile, culturally diverse areas containing a paucity of available legal support and few, if any, Creole interpreters." *Jean I*, 530 F. Supp. at 926. They separated husbands from wives and parents from children, with "cruel results." *Jean II*, 544 F. Supp. at 981 n.24. They applied the detention policy to Haitian children, *id.*; *see also* (PX 45, R. at Vol. 45, pp. 1529-31; PX 46, *id.* at 1561-62; PX 48, *id.*).

They held class members in substandard facilities and subjected them to harsh conditions. (R. at Vol. 41, pp. 918-19.) They physically abused some Haitians, (R. at Vol. 43, pp. 1224, 1251), and denied others appropriate care for their medical conditions. (*Id.* at 1258.) They moved some Haitians to other facilities at night, without allowing them to take their clothes or belongings and without telling them where they were going, leading some to be terrified that they were being returned to Haiti. (R. at Vol. 41, pp. 923-25.)

The effect of this long-term, isolating and abusive detention was predictable. (*See* Master's Report and Recommendations at 12, 14, 15, 16, 18, R. 2112, 2114, 2115, 2116, 2118; PX 62.1A, R. at Vol. 39, pp. 335-36). The mental health of many of the Haitians in detention deteriorated rapidly under these conditions. (R. at Vol. 39, pp. 370-71; Vol. 42, p. 1058.) One of the named plaintiffs, Prophete Talleyrand, was one of several class members who committed suicide while incarcerated during the pendency of this litigation. *Jean VIII*, Pet. App. at 76a; *see also* GAO, *Detention Policies Affecting Haitian Nationals* at 20-21 (1983).

This new policy was not implemented by formal rulemaking or agency operations instructions. Instead, notwithstanding the pendency of this lawsuit advising the INS of its failure to comply with the Administration Procedure Act, 5 U.S.C. § 553 ("APA"), INS and Department of Justice officials made no effort to promulgate guidelines or supervise operating personnel who exercised delegated authority. *Jean II*, 544 F. Supp. at 981; *Jean IV*, 711 F.2d at 1473-74. Inevitably, there were "inconsistencies between what the government witnesses said the policy was and the policy their subordinates were carrying out." *Jean II*, 544 F. Supp. at 981 n.24. Pointedly, no one in the chain of command from the Attorney General to the front line officers at the Krome detention center in Miami (where many class members were being detained) admitted to ever receiving or giving guidance as to who should be paroled and who should be indefinitely incarcerated. *Jean IV*, 711 F.2d at 1473-74.



The district court could "not think of any administrative action that would have a greater impact on a regulated group of people," *Jean II*, 544 F. Supp. at 997, and aptly observed that "these refugees, seeking the promised land, have instead been subjected to a human shell game [by] the arbitrary Immigration and Naturalization Service . . . . INS officials have acted as haphazard as the rolling seas that brought these boat people to this great country's shores . . . . [E]ven though INS officials have been rudderless in the enunciation and application of an immigration policy, when they decided to move the Haitians to these remote areas, they acted with laser-like precision." *Jean I*, 530 F. Supp. at 926.

The litigation that ensued commenced on June 10, 1981, when respondents, a class of black Haitian refugees seeking asylum, filed an emergency habeas corpus petition challenging, in part, the procedural fairness of the mass exclusion hearings and the discriminatory treatment of Haitians. *Jean IV*, 711 F.2d at 1462. After a hearing that documented the procedural irregularities and the inaccurate, misleading translations of the mass hearings, the government confessed error, but not before the government had improperly deported eleven Haitians. *Jean I*, 530 F. Supp. at 928; *see also Jean IV*, 711 F.2d at 1463 n.1 (the government admitted its procedures "were faulty and not in compliance with law").

The district court promptly entered interim relief. On July 10, 1981, the district court vacated and remanded to the INS all final orders of exclusion that had been entered pursuant to the faulty procedures and stayed all further deportations of class members. On September 9, 1981, the district court entered a temporary restraining order, later converted to a preliminary injunction, staying exclusion hearings for unrep-

resented class members and enjoining INS from deporting any member of the class. *Jean I*, 530 F. Supp. at 929-30. In a strongly worded opinion, the district court found serious fault with the closed-door accelerated exclusion hearings, the improper deportations, *id.* at 928, and, the "human shell game." *Id.* at 926; *see also Jean IV*, 711 F.2d at 1463. The court held that respondents were likely to succeed on the merits of their claims and that the "INS has thwarted the statutory and regulatory rights of these refugees to representation in their exclusion proceedings." *Jean I*, 530 F. Supp. at 927. The government did not appeal this order.

Notwithstanding this early indication of the lack of merit of its position, the government caused extensive pre-trial discovery and motion practice, and forced a lengthy trial on the underlying facts rather than simply engage in APA rulemaking that could have alleviated within weeks the harsh and traumatic effects of its action. Steadfastly, the government refused even to admit that there had been a policy change, contesting virtually every factual issue underlying respondents' APA claim. *Jean IX*, Pet. App. at 32a-33a; *see also Jean VIII*, Pet. App. at 76a-77a. Courts have since three times had occasion to remind the government (in the context of the government's endlessly renewed assertion that its "action" for EAJA purposes was "substantially justified") that "[i]t was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had instituted this policy without complying with rulemaking procedures," *Jean VII*, Pet. App. at 94a-95a, and that "[t]he government even opposed Plaintiff's efforts to seek summary judgment on the A.P.A. issue and thereby unnecessarily prolonged the litigation." *Jean VIII*, Pet. App. at 77a; *see also Jean IX*, Pet. App. at 17a.

On June 18, 1982, after a six-week trial, the district court held that the government had violated the APA by instituting an incarceration policy without formal rulemaking. *Jean II*, 544 F. Supp. at 997. The court also ruled that under the Equal Protection component of the Due Process clause, respondents could not be denied parole solely because of their race and/or national origin, but held that plaintiffs had



failed to prove that petitioners intended to discriminate, despite the disproportionate impact of the detention policy on Haitians. *Id.* at 998-1001. After considering briefs and extensive oral argument, the court of appeals denied the government's application for a stay pending appeal stating that the government had failed to demonstrate *any* of the four factors needed for a stay, including likelihood of success on their APA arguments. *Jean III*, 683 F.2d at 1312.

Upon the government's expedited appeal of the APA ruling and related release plan and respondents' cross-appeal, a panel of the court of appeals for the Eleventh Circuit:

> (a) affirmed the district court's APA ruling and agreed with the lower court finding that the INS had changed its prior policy of release and adopted a new policy of incarceration for all undocumented Haitians, and that this drastic change was a rule not within any of the rulemaking exceptions of the APA, *Jean IV*, 711 F.2d at 1483;
>
> (b) reversed the district court's Equal Protection ruling as "clearly erroneous," holding that plaintiffs had proven a "stark pattern" of intentional discrimination through "a mass of testimony and documents," *id.* at 1501, in addition to "a wealth of statistical evidence," *id.* at 1487, which was essentially unrebutted but for defendants' "mere protestation" and "arguments of counsel," *id.* at 1501-02;
>
> (c) on the claim that the government had denied respondents early notice of their rights to petition for asylum, held that the issue was justiciable and that the INS' "failure to notify an alien of the right to claim asylum, thereby closing the door entirely on the process, [violated] the right to present a petition for asylum," *id.* at 1507; and
>
> (d) recognized that the issues raised under the First Amendment were not moot because class members continued to be incarcerated, sustained the Haitian Refugee

> Center's right of access, and remanded the case to review INS' access restrictions in light of its opinion, *id.* at 1509.

On rehearing *in banc*, the court of appeals held that because the government had released detained class members pursuant to the district court's order, the government's appeal of the APA ruling was moot. *Jean V*, 727 F.2d at 962. Without disturbing the factual findings of the panel as to the government's conduct, *id.* at 962, the *in banc* court ruled that excludable aliens seeking admission to this country "have no constitutional rights with regard to their applications," *id.* at 968, and thus could not challenge petitioners' conduct on Equal Protection grounds.

On writ of certiorari, this Court ruled that the court of appeals should not have reached and decided the parole question on constitutional grounds, since plaintiffs had obtained all they sought to obtain by virtue of their statutory argument. *Jean VI*, 472 U.S. at 848, 855. This ruling followed the government's concession before this Court, for the *first time* in the years of this litigation, that race and national origin could not be used as criteria in making parole decisions. *Id.* at 866 n.5 ("Before this Court, the Solicitor General argues that the INS is precluded by statute and regulations from making nationality-based distinctions. At trial, however, the Government argued the opposite. . . . [T]he Solicitor General's representations are flatly inconsistent with the Government's own position at trial; they reflect nothing but a change in the Government's litigation strategy.") (Marshall, J., dissenting).

The government's position in this long and bitter court battle was characterized by the district court as "unusually unwaivering and litigious . . . throughout." *Jean VIII*, Pet. App. at 76a. The district court emphasized in its consideration of the fee application:

> Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a position requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as in law, each and every important issue asserted by Plaintiffs.



*Id.*, *see also* J. App. at 1-88 (docket sheet).

**B. The Resolution of the Fee Petition**

Respondents filed their initial petition for an award of fees and costs under EAJA in 1982. (Docket entry 501, J. App. at 58.) Over the course of the next three years, the government briefed its strenuous opposition to respondents' eligibility for EAJA fees, arguing repeatedly that respondents were not the prevailing parties and that the government's position had been substantially justified.

On December 6, 1985, the district court resolved the issue of eligibility in favor of respondents. *Jean VII*, Pet. App. at 87a-99a. In ruling that respondents were the prevailing parties, the court found, among other things, that respondents' victory on the APA claim had achieved the two primary goals of the lawsuit: the cessation of mass exclusion hearings being held without counsel and release of class members from detention pending a determination of their political asylum applications. *Jean VII*, Pet. App. at 90a-92a, *quoting Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("[f]or purposes of attorneys' fees, '[t]he result is what matters' "). The court rejected the government's characterization of the relief obtained as technical, partial, or moot, noting that the lawsuit had effectively provided respondents with all of the relief sought in the complaint.[5]

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5 As a direct result of the lawsuit: (1) the government stopped its practice of preventing lawyers from contacting Haitians at closed exclusion hearings (Count I); (2) the court declared the new detention policy "null and void," and released class members from detention, and plaintiffs have been

The district court also rejected the government's contention that its position on the APA claim was substantially justified. The court specifically found that the government's original actions and obstinate defense of these actions throughout the litigation were unreasonable in light of (1) the fact that "the INS was well aware prior to the litigation that the courts in this jurisdiction had consistently rejected the INS' claim that the APA did not apply to changes of substantive policy regarding Haitian refugees;" (2) advice as early as March 20, 1981 from the INS Acting General Counsel that the agency was required to comply with the APA; and (3) the complete rejection of the government's claims in successive decisions of the district court and court of appeals. *Id.* at 93a-94a. The district court made the additional determination that the government's factual position was not substantially justified, observing that "[i]t was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had instituted this policy without complying with rulemaking procedures." *Id.* at 94a-95a. The court then found that there were no special circumstances which would make a fee award unjust; rather, "considering the extraordinary efforts of plaintiffs' counsel and the excellent results they achieved, it would be unjust to deny an award of attorneys' fees." *Id.* at 95a.

In connection with the fee application, respondents filed lengthy affidavits detailing the amounts requested and explaining exercises of billing judgment that, among other things, were aimed at minimizing litigation over the amount of the award.[6] The government nonetheless insisted on a evi-

able to retain counsel to advise them on their procedural rights (Count III); (3) denial of access to counsel was cured (Count IV); (4) Haitian exclusion hearings are now open to the public (Count V); (5) plaintiffs effectively obtained the right to apply for political asylum (Count VI); and (6) the government promulgated new parole regulations which are expressly facially neutral (Count VII). *Jean VII*, Pet. App. at 91a n.4.

6 For example, in a 1982 affidavit, Robert E. Juceam, the senior member of the Fried, Frank, Harris, Shriver & Jacobson team, explained that he sought no award for his time so that there would be no dispute as to allocation of his time to activities connected with his role as president of the



dentiary hearing. (Docket entry 582, J. App. at 67). At that hearing, which spanned five days in February and March of 1986, respondents produced for examination by the government several experts and representatives of the law firms or attorneys who had submitted affidavits seeking fees.[7] At the government's insistence, respondents also introduced into evidence thousands of pages of backup documentation for their detailed fees, costs and expenses. (1-10 Resp. C.A. Br. App., Tabs 4-47.) The district court gave the government unlimited opportunity to cross-examine each witness. Moreover, since the hearing was not held on consecutive days and there were gaps of several weeks between sessions, the government had ample opportunity to review and challenge all submitted evidence. *Id.*

The government declined to introduce a single witness or piece of evidence on its own behalf. *Id.* Rather, at the conclusion of the hearing, the government presented once again a lengthy exegesis of its original position on entitlement, *i.e.*, that respondents did not prevail on the merits and that the government's position on the APA was substantially justified.[8] The government did not by way of evidence or argu-

American Immigration Lawyers' Association. (J. App. at 105). In his affidavit Mr. Juceam also pointed out that the firm's initial request of $82,000, which the government opposed, represented approximately a $50,000 discount from the actual fees incurred at that point. (J. App. at 107-08). Respondents' efforts to minimize fee litigation were unavailing. The government has mounted repetitious attacks on the fee request that have served only to multiply the amount of fees for fees and the number of judicial decisions rejecting seriatim identical government objections.

7 Vera Weisz, for example, did not travel between Los Angeles and Miami to write a fee petition as the government now asserts. *See* Pet. Br. at 16 n.17. Rather, she traveled from Los Angeles, where she resides, to Miami, where the court was holding a hearing, to accommodate the government's demand that it be given opportunity to cross-examine the authors of the affidavits submitted in support of the fee petition. The government could have conducted, but did not conduct, any pre-hearing discovery to test this or any other affidavit.

8 These precise arguments had already been rejected by the district court after lengthy briefing. *See Jean VII.* The substantial justification point,

ment then or at any other time assert that its position on fees was "reasonable" or "substantially justified," nor has it ever in any way contested the factual basis for the amount of the fees for fees requested. *Id.*; *Jean VIII*, Pet. App. at 85a.[9]

On August 29, 1986, the district court issued an order on the amount of the fee award that, among other things, "direct[ed] the Plaintiffs' counsel to submit for the Court's review affidavits concerning the fees, costs and expenses incurred in pursuit of attorneys' fees." J. App. at 148. Respondents submitted these affidavits during the first week in September, 1986. J. App. at 165-175. The government submitted no response to these affidavits. J. App. at 78-79. On September 10, 1986, the district court withdrew its August 29, 1986 decision in order to consider the impact of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). J. App. at 176.

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moreover, consisted of little more than reargument of alleged merits of petitioners' view of the governing law, which had already been pressed unsuccessfully before no fewer than four separate courts in litigation on the merits—the district court (*Jean II*), a panel of the court of appeals on application for a stay (*Jean III*), a panel on appeal (*Jean IV*), and the court of appeals sitting *in banc* (*Jean V*). Not a single judge on any of these courts endorsed a single aspect of the government's position. *See also Jean IX*, Pet. App. at 13a-14a ("The government is asking, in essence, that we reweigh the merits of its defense on the APA claim").

9 Nor did any proposed finding of fact or conclusion of law attempt to sustain the government's burden to meet that standard. The government's submissions after the hearings also do not contain a single objection to the amounts of fees for fees involved. During oral argument after close of the hearing on fees, the government only asserted the narrow legal point that no hours should be awarded for the "fee application" if "the government's defense of the fee application was a reasonable one." *See* Pet. Rep. at 1. Similarly, in the proposed findings, the government's sole reference to fees for fees was a proposed conclusion that "[t]ime expended on preparing and pursuing a fee award is not compensable under EAJA unless the government's defense of the fee question is not 'substantially justified.' " *See id.* at 2. Of course, in this Court, the Government has conceded that fees for preparing the fee petition are compensable without a separate "substantial justification" determination. *See* Pet. Br. at 15 n. 17.



On October 1, 1986, the district court issued an amended order which, like the August 29, 1986 order, awarded fees, costs and expenses in an amount substantially less than that requested, compensating respondents for half of the time actually spent on the litigation. *Jean VIII*, Pet App. at 78a.[10] The district court made numerous and detailed findings of fact in applying the variety of tests that are used to limit an award under EAJA to a "reasonable"-amount. Among other things, the court examined each of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and additional factors that supported an award at an hourly rate exceeding $75.00 and an overall enhancement of the award under *Delaware Valley*, *supra*, *Blum v. Stenson*, 465 U.S. 866 (1984), and *Hensley*, *supra*.

The court also segregated hours attributable to work on respondents' Equal Protection claim under *Hensley*, *supra*, to the extent that this substantive claim was based on different government acts and legal theories and could be treated as if it were a separate lawsuit. With respect to the Equal Protection claim, however, the court awarded fees for 25% of the hours spent on appeal to this Court on the ground that the claim need not have been litigated at all if the government had earlier made the change in its litigation position that it adopted for the first time at oral argument in this Court. *Jean VIII*, Pet. App. at 69a-71a.

On the issue of fees for litigating objections to the fee petition, the court noted that respondents had submitted affidavits detailing these amounts and that:

> None of the fees, costs or expenses have been challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing. As the government has voiced no objection to these fees, costs and expenses and based upon the Court's previous findings under *Johnson* and the other factors enumerated above, which

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10 Although plaintiffs had at that juncture spent nearly 20,000 hours on the litigation, they only requested reimbursement for approximately 11,000 hours, and were awarded fees for approximately 6,000 hours. *See* 1-3, 5 Resp. C.A. Br. App. Tabs 4-5, 7, 9-10, 13-16, 18, 20-30, 37-39; *see also Jean IX*, Pet. App. at 18a.

it incorporates herein, the Court believes these requests are reasonable.

*Id.* at 85a.

Finally, the court enumerated the bases of its factual and legal conclusions as to duplication and documentation of hours, *id.* at 67a-71a, and the recoverability of costs and expenses. *Id.* at 78a-84a.

**C. The Appeal of the Fee Award**

On appeal "the government . . . contested virtually every aspect of the district court's legal rulings and calculations." *Jean IX*, Pet. App. at 7a.[11] In response, the court of appeals affirmed the district court's threshold finding of eligibility. The court of appeals agreed with the district court's finding that respondents were the prevailing parties, dismissing petitioners' attempt to disparage the relief obtained: "we do not think this case is one in which the victory secured was merely technical or formalistic." *Jean IX*, Pet. App. at 23a.[12]

The court of appeals affirmed as well the district court's finding that the government's position was not substantially justified. The court observed that "[i]n disputing the district court's conclusion on the question of substantial justification, the government argues that the district court simply erred with respect to the APA in [the merits litigation]." *Jean IX*,

11 Meanwhile, having ignored the district court's request for submissions as to the scope of relief on remand from the court of appeal's 1984 *in banc* decision on the merits, the government waited until briefing of the appeal of the fee award to seek a writ of mandamus ordering the district court to vacate its injunction with respect to the APA claim. *See* Docket entry 649, J. App. at 75; Docket entry 692, J. App. at 79; Pet. Br. at 6 n.7.

12 After the government's motion for a writ of mandamus was denied, the government appealed the district court's order on remand and ultimately obtained from the court of appeals an order that the injunction be vacated as moot. The court of appeals addressed the government's transparent attempt to use its belated appeal of the continued APA injunction to bolster its position on the "prevailing party" issue on the appeal of the fee award: "[t]his new decision [directing the district court to vacate its motion as moot] adds nothing to the posture of this case." Pet. App. at 9a n.9.



Pet. App. at 13a. The Eleventh Circuit declined to "reweigh the merits of [the government's] defense on the APA claim," *id.* at 14a, stating, among other reasons, that there was a sufficient basis in the record for "[t]he important fact for the district court [, which] was that the defendants willfully ignored the advice of counsel" and observed that "the government's only real response to this point . . . is patently frivolous." *Id.* at 16a. The Eleventh Circuit found support in the record, as well, for the district court's finding that the government unreasonably protracted the litigation. *Id.* at 17a.

Turning to the amount of reimbursable hours, the court of appeals rejected the government's arguments with respect to hours spent on unsuccessful substantive claims, documentation, and duplication of effort. *Id.* at 20a-25a. The only point on which the court of appeals reversed—and indeed the only component of the award that was reversed—was the district court's award of fees for work on appeal to this Court. *Id.* at 18a-20a.

On the subject of hourly rates in excess of $75, the Eleventh Circuit rejected the government's argument that no cost of living adjustment could be made for services performed prior to 1985, and remanded solely for mathematical quantification of the cost of living adjustment. *Id.* at 27a. Similarly, the court agreed with the district court's reliance on the "limited availability of qualified counsel" as a basis for an increase in hourly rates and remanded only for additional findings of fact on this point. *Id.* at 29a.

The court also rejected the government's contention that enhancement was unwarranted. *Id.* at 29a-30a. While it disagreed with the district court's findings that the *pro bono* nature of the case, the vindication of public rights and emotional hardship to respondents' counsel were "special factors" of the type required to support enhancement under *Pierce v. Underwood*, 487 U.S. 552, 109 S. Ct. 2541 (1988), the court of appeals agreed that "the government's unusually litigious position in this case might constitute a special factor" and remanded for additional findings on this point and other "potential special factors that would be consistent with *Pierce*." *Jean IX*, Pet. App. at 30a-33a.

The court of appeals then rejected *in toto* the government's attacks on reimbursement for telephone costs, travel costs, postage costs, computerized research costs, paralegal time, and law clerk time. *Id.* at 33a-37a.

The Eleventh Circuit also rejected the government's attack on the award of fees for fees for work performed before the district court through the decision in *Jean VIII*.[13] Rather, the court adopted the approach taken by the Second Circuit that "the government's position in the fee litigation is irrelevant to a determination whether a successful EAJA fee applicant can claim 'fees for fees'." *Id.* at 39a. In agreeing with this approach, the court of appeals did not simply adopt a rule of convenience to foreclose infinite litigation. Rather, it cited with approval the Second Circuit's analysis of the purpose and operation of EAJA:

> Since the purpose of the EAJA is to remove counsel fees as an impediment to challenging unreasonable and unjustified governmental actions, where a governmental action has been shown to have been unjustified, there should be as little disincentive for plaintiffs to obtain attorney's fees as possible. . . . To [accept the government's argument] would leave it in the power of the government, which already had been unjustified in its actions toward plaintiff, to so raise the cost of plaintiff's counsel's "doing business" simply by strenuous resistance to all fee applications as to discourage or economically prevent plaintiff from litigating against the government in the first place.

*Id.* at 40a, *quoting Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702, 707 (2d Cir. 1987).

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13 There has been as yet no motion for fees relating to post-*Jean VIII* litigation, which has consumed almost four years. By having to litigate extensively the fee petitions, respondents' counsel have had no reimbursements in a case now nine years old with fee and expense reimbursement petitions over eight years old. Even so, there is a prospect of substantial litigation yet ahead on the remand from the circuit court no matter how this Court determines the narrow issue on which petitioners sought certiorari.



Petitioners next sought rehearing *in banc*, which was denied on the ground that "no member of this panel nor other Judge in regular active service on the Court [has] requested that the Court be polled on rehearing in banc." Pet. App. at 103a. Then, although the district court had informed the parties of its desire to proceed expeditiously on remand, the government sought the first of repeated stays of the mandate to permit the Solicitor General to determine whether to file a petition for a writ of certiorari.

Finally, after six months of extensions, in October 1989, the government filed its petition for a writ of certiorari on an issue narrowly framed as follows:

> Whether—in a case where it is determined that the government was not substantially justified on the merits and is therefore liable for fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987)—the government must automatically pay fees incurred in litigating the fee award without a separate inquiry into whether the government's position in the fee litigation was substantially justified.

Pet. at 1.[14]

The petition states as the reason for a writ of certiorari that the court of appeals adopted an erroneous rule on an issue as to which there was conflict in the circuits. Pet. at 10-11. The petition also announces the government's intention to proceed with the fee litigation by piecemeal review of the Eleventh Circuit's decision: "There are several significant errors in the opinion of the court of appeals. We have nevertheless concluded that only one of those errors—the adoption of a 'per se' rule for the award of fees for the fee litigation—

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14 In its brief the government has recast this question to delete any reference to the substantial justification determination that has already taken place. *See* Pet. Br. at (I) ("Whether, in a case where the federal government is liable for attorney's fees under [EAJA] it must automatically pay fees incurred in litigating the fee award without a separate inquiry into whether the government's position in the fee litigation was substantially justified.")

merits this Court's attention *at this time*." *Id.* at 10-11 (emphasis added).[15]

## SUMMARY OF ARGUMENT

The Equal Access to Justice Act ("EAJA") provides that "a court shall award to a prevailing party . . . fees and other expenses . . . incurred by the party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified. . . ." In 1985, the Congress amended EAJA to define the "position" of the United States to include the underlying action of the agency upon which the civil action is based, as well as the government's litigating position in the civil action. 28 U.S.C. § 2412(d)(2)(D).

1. The clear language of the statute rebuts the government's contention that substantial justification can be determined at successive stages in the litigation and that, at the fees for fees stage, the court need only consider the government's litigating position. EAJA nowhere directs a court to determine substantial justification in successive stages of a civil action. It speaks in all relevant sections only of the *position* (not positions) of the United States in the "civil action." 28 U.S.C. §§ 2412(d)(1)(A), 2412(d)(1)(B), 2412(d)(2)(D). The EAJA fee litigation is part of the same "civil action" and it is brought on by a petition for fees in that civil action, not by filing a complaint initiating a new civil action. The determination of substantial justification, therefore, is a threshold determination of eligibility for a fee award, not a substantive condition to be applied after eligibility is adjudicated.

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15 The government asserts as additional errors the court of appeals' affirmance of eligibility (thus renewing for the fourth time in this fee litigation the government's contentions that respondents did not prevail and that the government was substantially justified) and the court of appeals' suggestion that expertise in immigration law and the government's litigiousness might be factors supporting enhancement. Pet. at 10-11 n.10.



Once the substantial justification eligibility requirement has been satisfied, EAJA authorizes an award of "fees and other expenses" for the entire "civil action," subject only to a determination of their reasonableness. Such "fees and other expenses" are defined to include "reasonable attorney's fees," 28 U.S.C. § 2412(d)(2)(A), and such "fees and other expenses" are awardable for the "civil action." The reference to attorney's fees includes fees on fees; that is, compensation for attorney time expended in the same "civil action" in order to establish an entitlement to and the amount of an EAJA award.

Moreover, the government's reading of the statute to require successive substantial justification determinations would contradict the definition of "position of the United States" added by the 1985 amendments to EAJA, which broadened the "position of the United States" to include both the government's litigation position and the underlying agency action. Thus, in order for the government to carry its burden of demonstrating that "the position of the United States was substantially justified," it must demonstrate that both its litigation position and the underlying agency action were substantially justified. When, as here, the underlying agency action is determined to lack substantial justification, eligibility of the plaintiff to an EAJA award of "fees and other expenses" for the entire "civil action" is established without regard to the reasonableness of the government's litigation position. Indeed, since the underlying agency action—the "action or failure to act by the agency upon which the civil action is based" by definition cannot be changed by any action taken by the agency or position asserted by the government after the civil action was filed, any reassessment of the substantial justification question, as the government seeks, could not result in a different conclusion on eligibility for a fee award.

In this case, the government's underlying actions were consistently found to be not substantially justified by every court to address the issue. As the "action or failure to act by the agency" does not change from the first determination of substantial justification, no statutory purpose would be served

by conducting an additional substantial justification inquiry. The government's argument, thus, flatly contradicts the 1985 amendment by eliminating the agency's underlying action as one of the aspects of the "position of the United States" that must be found to be substantially justified.

In addition, if Congress wanted to suggest that district courts should make new substantial justification determinations at various stages of the litigation rather than one initial threshold determination, it knew how to say so. Sections 2412(d)(1)(C) and 2412(d)(2)(D) demonstrate that when an EAJA test may be applied to "stages" of a litigation, the statute so provides.

The plain language of the statute also negates the government's dire prediction of "automatic" fees shifting. This argument ignores the numerous statutory provisions that give the court discretion to limit awards. The section defining "fees and other expenses," for example, states that they shall be "reasonable" and sets forth guidelines as to hourly rates. 28 U.S.C. § 2412(d)(2)(A). The amount of an award is subject, as well, to the discretion of the court to reduce or deny such award if "the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy," 28 U.S.C. § 2412(d)(1)(C), or "for any portion of the litigation which the party has unreasonably protracted the proceedings." 28 U.S.C. § 2412(d)(2)(D).

2. The legislative history confirms respondents' reading of the statute and rejects petitioners' efforts to create a separate substantial justification determination for fees where only the litigation position of the United States would be considered. The legislative history clearly provides that the "position" of the United States was defined to expressly eliminate the government's ability to escape liability merely by asserting a reasonable position in the litigation. H.R. Rep. No. 120, *supra*, at 8-14. Senator Charles Grassley, one of the sponsors of the bill containing the 1985 amendments, understood the legislation to prevent the government from making any arguments based solely on its litigation position that would allow it to



escape liability once the agency action was determined not to be substantially justified: "Thus, if the agency action that led to the litigation is not substantially justified, a prevailing party could be eligible for an Equal Access to Justice Act award, irrespective of the merits of the government's argument once they get to court." 131 Cong. Rec. S9992 (daily ed. July 24, 1985).

3. The government's proposed rule would also defeat the clear legislative purpose of EAJA. The purpose of EAJA is to ensure that agencies will be responsible for their conduct and will provide those "with modest means with access to the courthouse door" because "equal justice is not available when one cannot afford to fight." 131 Cong. Rec. S9997-98 (daily ed. July 24, 1985) (statement of Sen. Domenici). This Court recognized that purpose most recently in *Sullivan v. Hudson*, where its conclusion to award attorney fees to a social security claimant for representation provided during administrative proceedings was based in part on its determination that it would "find it difficult to ascribe to Congress an intent to throw the social security claimant a lifeline that it knew was a foot short." 109 S. Ct. 2248, 2256 (1989).

4. In the instant case, fee litigation has gone on longer than the underlying merits of the case. It would clearly be contrary to the purposes of EAJA to allow an agency whose underly ig actions lacked substantial justification to defeat an award of fees for fees by asserting the reasonableness of its litigation posture. This would allow a government agency to bully a litigant into abandoning a claim for costs and fees by using the threat of costly fee litigation that would remain uncompensated if the government's litigation position, even if not successful, is reasonable. It could, as here, through piecemeal litigation and colorable legal arguments, require plaintiffs to fight fee requests for over seven years with little likelihood that attorney fees will be resolved within a decade.

5. The government's suggestion that, alternatively, the Court should adopt the rule stated in *Russell v. Heckler*, 814 F.2d 148 (3d Cir. 1987), *vacated on other grounds*, 108 S. Ct.

2891 (1988), is without merit. The *Russell* rule, like the construction urged by petitioners before this Court, simply rewrites the definition of "position of the United States" contained in the statute to permit the government to assert its litigation position as a sole basis for substantial justification. Congress expressly stated in Section § 2412(d)(2)(D) that the position of the United States refers to both the challenged agency action and the government's litigation position. It is a well-established principle of this Court that "Congress is the body to amend [a statute] and not this Court." *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 340 (1897).

6. Finally, the government on this record has waived its opposition to the fee award for the fee litigation. Despite its discussion of various phases of this case, the fee award involved here related only to the fee litigation in the district court. It did not involve any attorney's fees for respondents' legal work on the fees appeal. In the district court, the government did not contest the fee amount and does not contest that amount in this Court. Moreover, even assuming that the government's position that a new substantial justification inquiry was required is correct, the government failed altogether to present any evidence or put forth any argument to meet its burden of proof to establish that its position was substantially justified. Because both the clear language of the statute and *Pierce* place the substantial justification burden on the government, the district court's finding of waiver is clearly correct. As a result, the issue on which certiorari was granted is not presented by this record, and the writ should be dismissed as improvidently granted.

## ARGUMENT

Nine years ago, in 1981, the government engaged in conduct towards respondents that no fewer than five times since has been ruled indefensible and three times more to have been not substantially justified. *See Jean I*; *Jean II*; *Jean III*; *Jean IV*; *Jean V*; *Jean VII*; *Jean VIII*; *Jean IX*. A year and a half later, respondents obtained a favorable judgment at trial



and sought fees under EAJA in an amount of approximately $500,000. 3 Resp. C.A. Br. App., Tabs 9-10, 13-14, 18, 20-21, 23-25. The government opposed the fee petition and forced respondents to defend the judgment on the merits, at a cost to respondents of an additional $1,000,000,[16] through successive appeals and corollary proceedings that in no way disturbed the outcome of the trial on the merits. *See Jean VIII*, Pet. App. at 55a; *see also Jean I*; *Jean II*; *Jean III*; *Jean IV*; *Jean V*.

Defense of the fee petition in this action has now lasted nearly twice as long as litigation on the merits. Yet the present posture of the fee petition differs from its posture in 1982 in only two respects: respondents have now obtained three successive judicial rulings rejecting the objections asserted by the government in 1982, and the fees for fees are correspondingly higher. *See Jean VII*; *Jean VIII*; *Jean IX*. The government's so-called victories in the fee litigation have done little more than reduce or threaten to reduce the award by dollar amounts that have been incurred for the most part since 1982, and that are in any event smaller than the undisturbed fees that have accrued in litigation that the government has pressed to no advantage since 1982.[17]

Now the government has announced its intention to proceed with piecemeal review of the decision below, and has not sought review "at this time" (Pet. at 10-11) of other matters it asserts are "errors."[18] It has, moreover, chosen

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16 These figures do not take into account the amounts voluntarily excised by counsel in an effort to minimize litigation over fees or otherwise. *See, e.g.*, J. App. at 107-08 (Juceam Affidavit).

17 The Supreme Court fees that were deleted by the court of appeals were not incurred until 1984-85. If the government were to succeed on remand or further appeal in erasing entirely the enhancement and hourly rates higher than $75 (and it did *not* do so in the court of appeals) the resulting reduction would leave undisturbed an award (including interest but not "fees for fees") of $800,000. *See Jean VIII*, Pet. App. at 74a, 84a.

18 Of the other three asserted "errors," one (on the issue of what constitutes a "special factor" justifying enhancement) bears directly on the fact finding that has been ordered by the court of appeals, and the other two (on)

to frame this "error" as a narrow legal issue—whether a standard exists—that will then enable the government to litigate through the courts once again on the question of whether the government has met that standard.[19] There is no conceivable economy or rational litigation purpose to be served by this appeal. The government's announced strategy of piecemeal review will simply prolong to the maximum degree final resolution of a fee request that has now been pending for eight years.

The government's posture in this lawsuit and on this appeal epitomize the abuses Congress sought to correct in enacting EAJA and demonstrate the patent incompatibility with EAJA of the self-serving "rule" that the government urges here. The government's argument—that a substantially justified litigation position in opposition to a fee petition should defeat an award of fees for fees—distorts the plain language of EAJA, defies the express intent of the legislature, and thwarts the public policies embodied in the statute and enunciated by this Court. The prevailing view in the circuits—that an award of fees for fees requires no independent inquiry into the substantial justification of the government's "position" with respect to fees—is correct and should be affirmed.[20]

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the issues of "substantial justification" and "prevailing party"), if they had been appealed to this Court and resolved in favor of the government, would have alleviated the need for any further proceedings. Manifestly, the government would rather litigate the "substantial justification" and "prevailing party" issues *sub rosa*, as it does on this appeal, rather than risk immediately a fourth and final rejection of its arguments.

19 By framing the question inappropriately as a purely legal issue, the government also uses the opportunity to structure its case here in terms of an entirely hypothetical "reasonable" position on fees.

20 The court below followed the approach of the Second Circuit in *Trichilo*, *supra*, which reasoned that the central purpose of EAJA would be undermined if the government could threaten the sanction of unreimbursed fees for endless defense of the fee application. The rule that there is no separate "substantial justification" inquiry for "fees for fees" has also been followed by the First and Fifth Circuits. *See Powell v. Commissioner*, 891 F.2d 1167 (5th Cir. 1990), *reh'g denied*, (Feb. 14, 1990); *McDonald v. Secretary of Health & Human Services*, 884 F.2d 1468 (1st Cir. 1989). The D.C. Circuit "indicated a preference" for this rule, but suggested an exception for "technical defense[s]" such as late filing. *See American Academy of Pediatrics v. Bowen*, 795 F.2d 211, 213 (D.C. Cir. 1986).

The Seventh and Eighth Circuit cases cited by the government for the proposition that a separate substantial justification inquiry is required were decided prior to the 1985 amendments, which, as set forth below, preclude such review. *See Cornella v. Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321 (7th Cir. 1985). The Ninth Circuit has applied a substantial justification test to fee litigation without considering the significance of the 1985 amendments. *See National Wildlife Fed'n v. Federal Energy Regulatory Comm'n*, 870 F.2d 542, 547-48 (9th Cir. 1989).

In *Russell v. Heckler*, 814 F.2d 148, 155 (3d Cir. 1987), *vacated on other grounds*, 108 S. Ct. 2891 (1988), the court adopted a compromise position, stating that the government will almost always be substantially unjustified in opposing fees on the ground that the initial substantial justification review was erroneous, but permitting substantial justification review of other objections to fees.



## I. THE PLAIN LANGUAGE OF EAJA PRECLUDES REVIEW OF THE "SUBSTANTIAL JUSTIFICATION" OF THE GOVERNMENT'S "POSITION" ON FEES

The plain language of EAJA rebuts the government's claim that the court must examine the "substantial justification" of the government's "position" on fees before it may award "fees for fees." The statute's "substantial justification" test is stated in 28 U.S.C. § 2412(d)(1)(A), which provides that a prevailing party shall receive fees unless the government meets this burden:

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

EAJA nowhere directs a court to repeat this inquiry as a predicate to an award of fees for the fee litigation. Indeed,

the statute does not distinguish fee litigation from the rest of the civil action for any purpose.[21]

To the contrary, the statute clearly sets forth the "substantial justification" test as a threshold to eligibility that by its terms cannot be repeated at the "fee litigation" or any other stage of the case. Once the government has failed to prove that its conduct in violating the prevailing party's rights was substantially justified, the prevailing party is entitled to all reasonable fees incurred in vindicating those rights. These fees are limited by other provisions of EAJA that the government deliberately ignores in its parade of horribles about the "automatic" fee shifting that will occur in the absence of repeated "substantial justification" review. The statute more than adequately protects the government with provisions that are designed for that purpose. *See* 28 U.S.C. § 2412(d)(1)(C) and (d)(2)(D), discussed, below. The rule proposed by the government distorts the clear language and function of the

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21 The government's deduction of such a distinction from the statutory definition of fees is spurious. "Fees and other expenses" are defined to include:

> the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees.

28 U.S.C. § 2412(d)(2)(A).

The government infers from this definition that fees for fees are not "necessary for the preparation of the party's case" and therefore require separate treatment. *See* Pet. Br. at 17-18. This argument ignores the plain language of the statute (which qualifies *costs* with the phrase "necessary for the preparation of the party's case" and *fees* with the adjective "reasonable"). It also begs the relevant question: whether fee litigation is part of the case. The government concedes that issue; indeed, without this concession it could not press the question it has framed for this Court. *See* Pet. Br. at 17 ("[f]ee litigation is nevertheless part of the 'civil action,' and the 'substantial justification' requirement therefore applies in full.")

Moreover, the government's distinction between "fees for litigating the merits" and "fees for fees" is contradicted by the government's distinction elsewhere between fees for preparing an application, which it concedes are "part of the award on the merits," and fees for litigating objections to their application, which it asserts are not. *See* Pet. Br. at 9-11 and n.11.



"substantial justification" requirement and renders these other provisions superfluous.[22]

In awarding fees under EAJA, a court determines eligibility for the fee award as a whole by reviewing the position of the United States for substantial justification—an inquiry that can only be made once. A court is not directed to—and may not—review the "substantial justification" of the government's "position" at successive "phases" of the civil action. This conclusion is implicit in the reference in Section 2412(d)(1)(A) to "*the* position the United States" and it is made explicit by Section 2412(d)(2)(D), which defines "position of the United States" to mean "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." This definition requires the court to focus on the government conduct that forced the prevailing party to incur legal fees and does not permit the government to escape or limit those fees through assertion that one or another isolated litigation position was substantially justified.

Where, as in this case, the "agency action" that gave rise to the lawsuit was not substantially justified, the government cannot meet its burden. Even in the case not before this Court, where the government's pre-litigation conduct was justified, the prevailing party can cross this threshold if it is shown that "*the* position in . . . the civil action" was not substantially justified, i.e., that the government's defense of its conduct as a whole was unreasonable. There is no room in this definition for parsing the government's litigation position in stages. This clear focus on the government's overall position demonstrates that the government's inability to prove that it was "substantially justified" in forcing the prevailing party to redress its rights in court is a *threshold* to eligibility for the cost of vindicating those rights. It is not, as the government asserts, a mechanism for limiting the amount of that

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22 We note that the government did not consider 28 U.S.C. § 2412(d)(1)(C) or the second clause of 28 U.S.C. § 2412(d)(2)(D) to be "relevant statutory provisions" and does not mention them in its brief. *See* Pet. Br. at 2-3.

cost. The mechanisms for limiting the amount of an award are clearly set forth elsewhere in the statute.

The procedural section of EAJA, 28 U.S.C. § 2412(d)(1)(B), underscores the "substantial justification" test's function as an eligibility threshold and precludes repeated application of that test at successive "stages" of a civil action. This section not only directs an EAJA applicant to allege a lack of substantial justification as a predicate to an award of fees, but also precludes review of an isolated litigation position by requiring the court to review the entire record, including the record on the underlying act in ruling on that allegation:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award. . . . *The party shall also allege that the position of the United States was not substantially justified.* Whether or not the position of the United States was substantially justified *shall* be determined on the basis of the record (*including the record with respect to the action or failure to act by the agency upon which the civil action is based*) which is made in the civil action for which fees and other expenses are sought.

(emphasis added).[23]

The government's "position" at one phase or another of a civil action is by definition purely a litigation position. No new agency act arises from one phase to another; the entire civil action arises from the same underlying act. Thus, there simply does not exist a new "position," as that term is—defined in Section 2412(d)(2)(D) to review at different "phases" of the litigation in the manner in which Section 2412(d)(1)(B) says a court must, unless the court re-evaluates the underlying act in the context of different litigation positions. This is manifestly illogical; the underlying agency act is

23 The government apparently did not consider this section of EAJA to be a "relevant statutory provision" either, (see Pet. Br. at 2-3), and does not mention it in its brief.



either substantially justified or it is not. This type of repeated "substantial justification" determination is also at odds with the plain language of the statute, which speaks of a review of "the position" of the United States on the basis of "the record." *See* 28 U.S.C. § 2412(d)(1)(B).

The government's "position" in the fee litigation, as at any other stage, is purely a litigation position. The fee litigation manifestly arises from the "action or failure to act by the agency upon which the civil action is based." *See* 28 U.S.C. § 2412(d)(2)(D). Although new factual and legal issues are introduced at the fee stage of the "civil action," as at any identifiable "stage" of litigation, the only new agency act introduced at that stage is the action of the government's litigators in drafting and filing objections to fees and the various motion papers and briefs that prolong these objections. Indeed, the government concedes that the fee litigation is a "part of the 'civil action' " under EAJA, *i.e.*, part of the litigation that flows from the initial agency act. *See* Pet. Br. at 17. Thus, the "substantial justification" test by its terms cannot be repeated as a statutorily mandated predicate to "fees for fees."[24]

24 This "substantial justification" requirement thus obviously is not susceptible by analogy to the treatment of the "prevailing party" requirement set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See* Pet. Br. at 13, 29. When, as in *Hensley*, "distinctly different claims for relief . . . are based on different facts and legal theories" it does no violence to a requirement that a party "prevail" to treat "these unrelated claims as if they had been revised in separate lawsuits." 461 U.S. at 434-35. Procedural "phases" of a civil action are not analogous to separate lawsuits for the purpose of determining whether the government was justified in precipitating that lawsuit. If a party does not prevail on a claim that can be completely segregated from the rest of the lawsuit, there is no further inquiry to be made under the EAJA. Where, however, the party prevails and establishes that the government was not substantially justified in forcing the party to vindicate its rights in court, severing a "phase" of the litigation would serve only to nullify a determination previously made. We note that *Porter v. Heckler*, 780 F.2d 920 (11th Cir. 1986), which the government cites for its assertion that *Hensley* is applicable by analogy, was overruled by the court in *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1497 n.8 (11th Cir. 1986), *vacated in part, reh'g denied*, 804 F.2d 1573 (11th Cir. 1986) (en banc) where the court

The government's dire predictions of "automatic" fee shifting that will result if "substantial justification" review is not repeated at each phase of the case, *see*, *e.g.*, Pet. Br. at 12, 16-17, 19, 21, 25, 27-31, deliberately misrepresent the plain language of the statute by omitting all reference to EAJA provisions that directly address the issue of exorbitant fees and excessive or frivolous conduct on the part of a prevailing party. The government is already protected by EAJA provisions that direct the court to reduce or deny an award if "the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy," 28 U.S.C. § 2412(d)(1)(C), or "for any portion of the litigation in which the party has unreasonably protracted the proceedings." 28 U.S.C. § 2412(d)(2)(D). The court is also constrained to apply an overarching "reasonableness" test and to consider guidelines as to hourly rates. 28 U.S.C. § 2412(d)(2)(A). Thus, if a claim for fees for fees is unreasonable, the hours claimed on the rate of compensation can be reduced by the court's determination of a "reasonable attorney's fee." By pretending that these limitations do not exist and raising the specter of abuse, the government tries to make a case that "substantial justification" review should be used in their place. The government's proposed rule would amend the statute by adding requirements that do not exist and would render superfluous those that do.

stated that it did "not consider *Porter* to be a binding precedent" because in *Porter* the court "relied on the definition of 'position of the United States' which includes only the government's litigation position" and did not consider the "1985 amendments to the EAJA," which expand that definition. It is surprising that the government would even suggest application of *Hensley* to the present set of facts, *see* Pet. Br. at 20, since *Hensley* clearly does not permit the sort of hairsplitting the government seeks here. The government repeatedly heralds its "victories" in this fee litigation, without acknowledging that: (1) it utterly failed in its primary goal, which was to overturn the award in its entirety, and (2) its so-called meritorious contentions have reduced or threaten to reduce the award by amounts that are minor in comparison with the entire award and with the fees that the government has caused to accrue since the petition first was made. Even under *Hensley*, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention . . . . The result is what matters." 461 U.S. at 435.



The government's repeated warnings about an "automatic award of fees for fees" also ignore the "substantial justification" test's function as a threshold to eligibility for an award. Once the "substantial justification" eligibility requirement has been satisfied, EAJA authorizes an award of "fees and other expenses" for the entire "civil action," subject only to a determination of their reasonableness. Such "fees and other expenses" are defined to include "reasonable attorney fees," 28 U.S.C. § 2412(d)(2)(A), and since such "fees and other expenses" are awardable for the "civil action," the reference to attorney fees includes fees on fees, i.e., compensation for attorney time expended in the same "civil action" in order to establish an entitlement to, and the amount of, an EAJA award.

The sections that relate to the prevailing party's position, which require the court to examine "portions" or "phases" of the litigation further underscore the conclusion that the "substantial justification" test, which contains no such language, may not be applied to isolated segments of the civil action. Section 2412(d)(1)(C) directs the court's attention to the prevailing party's conduct "during the course of the proceedings," which Section 2412(d)(2)(D) defines as "any portion of the litigation." If the court determines the party "unreasonably protracted the proceedings" during "*any portion* of the litigation," it may reduce or deny the fee award. *Id.* (emphasis supplied). The "substantial justification" test, in contrast, does not direct the court's attention to the "position" taken by the government in the fee portion of the litigation or any other discrete portion of the litigation. In stating the "substantial justification" test, EAJA directs the court to "*the* position of the United States," 28 U.S.C. § 2412(d)(1)(A) (emphasis added), and "*the* position taken . . . in *the civil action*." 28 U.S.C. § 2412(d)(2)(D) (emphasis added). Sections 2412(d)(1)(C) and 2412(d)(2)(D) demon-

strate that when an EAJA test may be applied to "stages" of a litigation, the statute says so.[25]

## II. THE LEGISLATIVE HISTORY DEMONSTRATES THAT THE SUBSTANTIAL JUSTIFICATION TEST CANNOT BE APPLIED TO ISOLATED STAGES OF LITIGATION INCLUDING THE FEE STAGE

The government's repeated assertion that the rule applied below will upset the "careful balance" that Congress established in EAJA is a ludicrous interpretation of legislative history that states as the sole purpose of EAJA the expansion of government liability to curtail government abuse:

> The concept of the bill is simple. Through the device of fee-shifting, the bill attempts to overcome the financial obstacles which prevent citizens from . . . challenging the unreasonable exercise of government authority . . . . [T]he purpose of this bill is not only to compensate . . . the victims of arbitrary government actions. It is also intended to affirmatively to encourage citizens to challenge actions which they believe to be unreasonable and irresponsible.

125 Cong. Record S10914 (daily ed. July 31, 1979) (statement of Sen. DeConcini).

The rule applied by the court below—that the government's litigation position cannot be asserted as a defense to fees on fees—not only comports with EAJA's overriding purpose to provide litigants against the government with the means to vindicate their rights, it does so in a manner that the legislature expressly commanded when it amended EAJA

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25 The contrast is highlighted by the fact that both treatments are contained in one paragraph of EAJA, which states them in the disjunctive:

> "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings[.]

28 U.S.C. § 2412(d)(2)(D).



in 1985. The legislative history of those amendments repeatedly and emphatically condemns the government's attempt to limit or escape EAJA awards by asserting a reasonable litigation position. Congress states that the express purpose of the amendment is to *foreclose* the abuse of the "substantial justification" standard that the government proposes here.

In 1985, the House of Representatives reported that awards under EAJA were "dramatically less-than the $100 million annual cost estimated by the Congressional [Budget] Office . . . and higher amounts predicted by the Justice Department." H.R. Rep. No. 120, *supra*, at 9. Congress found that "[p]art of the problem in implementing the Act has been that . . . courts are misconstruing the Act." *Id.*

The "misconstruction" that concerned Congress was the precise construction urged by the government here—that the "substantial justification" of a litigation position can defeat an award of fees incurred in litigation arising from an unjustified agency act:

> In clarifying the "position" term, *the Committee expressly rejects the holding* [citation omitted] that the only government "position" to be scrutinized in the context of an EAJA case is that taken in the litigation itself.

H.R. Rep. No. 120, *supra*, at 12 (emphasis added).

To foreclose this erroneous interpretation of EAJA, Congress amended the statute to add: (1) 28 U.S.C. § 2412(d)(2)(D), which defines "position of the United States" to include "the action or failure to act by the agency upon which the civil action is based," and (2) the final sentence of 28 U.S.C. § 2412(d)(1)(B), which directs a court making a determination of the "substantial justification" of the "position of the Unites States" to review "the record with respect to the action or failure to act by the agency upon which the civil action is based."

The legislative history of the amendments to EAJA demonstrates that the operation of the "substantial justification" test as a threshold eligibility standard as set forth in Point I, *supra*, is exactly what Congress intended. Congress stated

that the 1985 amendments were intended to direct a court to review the act underlying the litigation when determining whether the government's position was substantially justified:

> The Committee's clarification of the "position" term is intended to broaden the court's . . . focus of inquiry for EAJA purposes beyond mere litigation arguments, *and to require an assessment of those government actions that formed the basis of the litigation.* We believe this conclusion is implicit in the EAJA definition of the term "United States," which "includes any agency and any official of the United States acting in his or her official capacity" . . . *rather than merely the position taken by the government's lawyers.*

H.R. Rep. No. 120, *supra* at 12-13 (emphasis added).

Congress further stated that it intended through this clarified focus to foreclose the government from asserting a "reasonable" litigation position as a defense to fees incurred in contesting unjustified government action. Since the purpose of EAJA is to remove the "economic deterrent to contesting government action" that lies in "the expense involved in securing vindication of . . . rights," S. Rep. No. 253, 96th Cong., 1st Sess. 1 (1979), the statute is a nullity if an EAJA litigant who has been aggrieved by unjustified governmental action can be forced nonetheless to bear the cost and fees of vindicating his or her rights because conduct of the government in court was reasonable. Thus, Congress emphasized:

> The issue is whether the United States may be relieved of liability to pay attorney's fees and reasonabl[e] expenses merely by showing its position 'as a party' in an adversary adjudication or court proceeding was 'substantially justified.' . . . . [T]he amendment will make clear that Congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation and the agency then rides to avoid such liability by reasonable behavior during the litigation.

H.R. Rep. No. 120, *supra*, at 11.



Conversely, Congress observed that it is no great "incentive to careful agency action," *see* H.R. Rep. No. 120, *supra* at 12, if liability for all or part of the cost of contesting that action can be evaded by the reasonable conduct of the government's litigators. According to Senator Charles Grassley, one of the sponsors of the bill containing the amendments,

> The bill . . . states clearly that when deciding whether a prevailing party shall be awarded fees, a court . . . shall evaluate both the Government's arguments made in the litigation and the agency action that made it necessary for the private party to seek relief. *Thus, if the agency action that led to the litigation is not substantially justified, a prevailing party could be eligible for an Equal Access to Justice Act award, irrespective of the merits of the Government's arguments once they get to court.* That is because the purpose of the Equal Access to Justice Act is to make Government bureaucrats think long and hard before they start an enforcement action. The focus of the Equal Access of Justice Act is not on making Government litigators behave once in court.

131 Cong. Rec. S9992 (daily ed. July 24, 1985) (emphasis added).[26]

As set forth by Congress, then, once the prevailing party has crossed the "substantial justification" threshold by establishing that the agency action underlying litigation was unjus-

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26 Senator Grassley continued by saying:

> Consistent with the general rule that successful litigants are ordinarily entitled to fees for their litigation of the fee application, a prevailing Equal Access to Justice Act party is eligible to recover attorney's fees for the fee litigation itself, subject to the Equal Access to Justice Act's terms, in any case in which the Government's position in the case, as defined in the bill, was not substantially justified.

131 Cong. Rec. S9992 (daily ed. July 24, 1985). The context demonstrates the legislature's specific intent to treat fee litigation like any other stage of a civil action that has arisen from an unjustified agency act, *i.e.*, to preserve an award of fees for that component regardless of the "reasonableness" of the government's litigation position. In this context, it is not necessary to guess—as does the government—what Senator Grassley's remarks "apparently contemplate." *See* Pet. Br. at 25 n.26.

tified, the ensuing entitlement to the cost of that litigation cannot be defeated by the government's assertion that its litigation position was "reasonable."

*A fortiori*, the government cannot limit those fees by asserting that it's position at an allegedly segregable stage of litigation defeats fees for that stage. Since the government's position at any segregated "stage" of litigation is purely a litigation position, there would be no "focus . . . on the unjustified government activity that formed the basis of the litigation," and the application of the substantial justification test would "result in the denial of . . . meritorious fee claims." H.R. Rep. No. 120, *supra*, at 12.

The government's primary response to this legislative history is that Congress intended that a prevailing party who crossed the threshold of demonstrating "unreasonable agency action" would be entitled thereby to the fees for "establishing that the underlying agency action is unlawful" only in some initial proceeding such as "fil[ing] a complaint." *See* Pet. Br. at 23. The government asserts that a "separate 'substantial justification' inquiry" is required for all "subsequent distinct stages in the litigation." *Id.* While the government does not provide an exhaustive list, it identifies at least three subsequent stages: "defining the appropriate relief to be awarded, . . . litigating appeals, [and] determining the availability and amount of attorney's fees." *Id.* This argument has no foundation in the legislative history or statutory text.

The government's argument that EAJA requires "substantial justification" review at successive stages flatly contradicts the explicit Congressional directive that a litigation position may not be reviewed in isolation. There is no difference between the government's "position" at trial and its "position" on appeal, to use one of the government's examples, other than the difference, if any, in "the position taken by the government's lawyers." *See* H. R. Rep. No. 120, *supra* at 12. By definition, each of these stages, like every stage of a given civil action, including defense of the fee application, flows from the same underlying agency act. Thus there is no way to use a "substantial justification" test to deny fees for an individual "stage" of a litigation without applying that



test to the government's litigation position in isolation from the underlying agency act.[27]

Moreover, Congress clearly envisioned that a prevailing party generally need do more than "file a complaint" to vindicate his rights. In enacting EAJA, Senator Goldwater described in detail the circumstances EAJA was intended to remedy:

> As high as . . . attorneys' fees may be at the trial level, a private citizen who wins his case there against the government and then is forced to defend his judgment in an appellate court after the Government appeals, cannot be reimbursed even when that person succeeds a second time upon appeal . . . . [S]hould the Government, with all its resources, choose to appeal a second negative decision up to the Supreme Court, then the private party must once again bear the entire burden out of his own pocket in order to pay the costs of counsel at this highest judicial level. Thus, a private individual or business could prevail three times in a case against the Government, and yet, never once could he recover the actual legal fees he has suffered to uphold his rights.
>
> [T]his glaring inequity of current law is an encouragement to governmental arbitrariness. What hope does a small citizen or business have to challenge all the

27 The government's bald assertion that "[f]ee litigation is different from litigation over the merits; the issues presented are not the same" (Pet. Br. at 17) does not warrant, much less compel, the distinction sought. This functional difference is true at any identifiable "stage" of litigation. Pre-trial discovery, for example, may involve unique factual issues (*e.g.*, availability or harassment of witnesses) and unique legal issues (*e.g.*, the permissible scope of discovery). Moreover, the so-called "new" issues at the fee litigation stage are inextricably interwoven with the factual and legal issues that are raised in the merits. In the fee litigation at bar, for example, the government has now asked courts three times to reweigh the merits of its arguments on the APA claim (*see Jean IX*, Pet. App. at 13a-14a), and finds it necessary to include in every brief a detailed exposition of the claims set forth in respondents' complaint. (*See e.g.*, Pet. Br. at 4-5 and n.4) The relevant fact is that the fee litigation involves no new underlying agency act.

> resources of the mighty Federal Government when even if he wins this administrative or judicial decision, his legal fees virtually leave him in bankruptcy.

125 Cong. Rec. S10917 (daily ed. July 31, 1979.) It is a sheer misstatement of this legislative history, and of the reality of the problems EAJA was designed to correct, to assert that the amendments to EAJA were only intended to secure for applicants the cost of "fil[ing] a complaint" or "negotiat-[ing] a settlement" and that all "subsequent" litigation costs could be subject to the reasonableness of the government's litigation position. *See* Pet. Br. at 23.

The government's argument that it should be allowed to limit fees through application of the "substantial justification" test rests, in the end, on its repeated assertion that Congress could not have intended to shift them "automatically" and without limit on amount. We can only assume that the government is unaware that limits on amounts are explicitly set forth in EAJA—and not in the "substantial justification" test. *See* 28 U.S.C. § 2412(d)(1)(C), (d)(2)(A), and (d)(2)(D).

Adopting the interpretation of EAJA urged by petitioners would simply require district courts to engage in a time consuming and ultimately meaningless exercise. To award a prevailing party its attorney's fees, the district court would first be required to find that the position of the United States—including the agency action giving rise to the litigation—was not substantially justified. When the prevailing party then applied for an award of fees for fees, the position of the United States (consisting of both the agency action and the government's litigation position on the fee application (28 U.S.C. § 2412(d)(2)(B)) would be reviewed for a second time. Since the lack of substantial justification for the agency action would now be law of the case, only the government's litigation position should be reviewable. And since Congress has made it emphatically clear in 28 U.S.C. §§ 2412(d)(1)(B) and (d)(2)(D) that a reasonable litigation position standing alone will not defeat an award of fees, subjecting an application for an award of fees for fees to substantial justification



review would be futile since the government should never succeed in defending against the application on this ground. The government will have succeeded only ensuring that the fee request "result[ed] in a second major litigation." *See Hensley*, *supra*, at 427.

## III. REVIEW OF THE SUBSTANTIAL JUSTIFICATION OF THE GOVERNMENT'S POSITION ON FEES WOULD COMPLETELY DEFEAT THE LEGISLATIVE PURPOSE

Even without Senator Grassley's explicit acknowledgement, it is obvious from the legislative history that a rule limiting access to fees for fees in the manner proposed by the government would completely defeat the statutory purpose. In enacting EAJA Congress recognized that the prohibitive cost of litigating against the government would simply compel an economic decision that the cost outweighed the benefits. Congress specifically sought to prevent the government from coercing compliance through this show of brute strength:

> It is clear that when the cost of contesting a government action exceeds the amount at stake, the economically practical choice is to settle, compromise or acquiesce, even if one believes the government to be unreasonable. . . . Government, by coerced acquiescence, is certainly inconsistent with a jurisprudential tradition which relies on the free and open exchange of opposing ideas in an adversarial process in order to insure legitimacy of the law.

*Award of Attorneys' Fees Against the Federal Government, Hearings on S. 265 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee of the Judiciary*, 96th Cong., 2d Sess. 23 (1980) (statement of Sen. DeConcini); *see also* S. Rep. No. 253, *supra* at 5.

It would clearly be anomalous to preclude the government from asserting its reasonable litigation posture as a defense to the cost of litigating the merits of a civil action, and then

permit it to bully that litigant into abandoning an award of those costs with the specter of costly fee litigation that will go unreimbursed if the government's litigation position, even if not victorious, is "reasonable." *Trichilo*, *supra*, at 707. As the government itself has elsewhere argued to this Court:

> The prospect of lengthy and unpredictable litigation about the availability of fees may make it impossible for persons interested in contesting government action to gauge the likelihood of a fee recovery. That uncertainty, and the expense associated with resolving it, may discourage challenges to unjustified government action.

Brief for the Petitioner, *Pierce v. Underwood*, 108 S. Ct. 2541 (1988) (available on LEXIS, Genfed library, Briefs file).

This Court has cautioned that "we must endeavor to interpret the fee statute in light of the statutory provisions it was designed to effectuate" and not "ascribe to Congress an intent to throw the . . . claimant a lifeline that it knew was a foot short." *Sullivan*, *supra* at 2256. Like the fees on administrative remand at issue in *Sullivan*, fees for defending objections to the fee application are "crucial to the vindication of [respondent's] rights," *id.*, citing *Delaware Valley*, *supra*, since "no fee award at all would [be] available to respondent[s] absent [their] successful conclusion." *Id.* While the government does not contend here that fees for fees are *per se* unreimbursable, it seeks to limit access to them in a manner that is not only at odds with legislative history that forbids assertion of a litigation position as a defense to fees, but that would defeat the central purpose of the statute by substituting the specter of unreimbursed fee litigation for the specter of unreimbursed litigation on the merits. The Court's conclusion in *Sullivan* is particularly apt here:

> Given the anomalous nature of this result, and its frustration of the very purposes behind the EAJA itself, Congress cannot lightly be assumed to have intended it.

109 S. Ct. at 2256.

The government does not even argue that fees for fees are not necessary to vindication of EAJA rights; rather, it has



the arrogance simply to assure the Court that the fundamental premises of EAJA that were embodied in the 1985 amendments are irrelevant to securing a fee award because the government will behave itself:

> It is of course true that conducting a separate inquiry into the reasonableness of the government's position in the fee portion of the case may result in a prevailing party not receiving compensation for all of its litigation expenses.
>
> * * *
>
> This does not mean that prevailing parties will be given a life line that is "a foot short" [citation omitted]. If the prevailing party makes a fee request that is reasonable, the government should ordinarily be expected to go along with it. . . .

Pet. Br. at 27 and n.28.

Obviously, as an academic and policy matter the government "should be expected to go along" with a reasonable fee request. In practice, the government does not, as the record in this case amply demonstrates. It is precisely because the government treats such requests adversarily that EAJA's protections were enacted. What the government seeks is that this Court, essentially as a legislative matter, revise EAJA to its litigation benefit. The principles enunciated in *Sullivan* compel a contrary ruling that preserves the protections embodied in EAJA.

## IV. THE GOVERNMENT STATEMENT OF POLICIES EMBODIED IN EAJA IS SPURIOUS

In seeking to have this Court give it what EAJA does not, the government presses a number of imaginative arguments based on alleged public policies ostensibly embodied in EAJA. Foremost among them is that the rule adopted below might chill government litigators' ability to "vigorously discharg[e] their responsibilities" to "resist . . . exorbitant fee requests." *See* Pet. Br. at 21; *see also* Pet. Br. at 20. No such chill is apparent on the record here. Moreover, this argument

is patently absurd in the face of the legislature's express intent to prevent the government's reasonable litigation position from diminishing the liability triggered by unreasonable agency action. *See*, *e.g.*, Remarks of Senator Grassley, 131 Cong. Rec. S9992 (daily ed. July 24, 1985) ("if the agency action . . . is not substantially justified, a prevailing party could be eligible for an . . . award *irrespective* of the merits of the Government's arguments once they get to court.") (emphasis added).

Nor does the absence of a reward for asserting reasonable litigation positions result in any "tax on government efforts to advance reasonable litigating positions," *see* Pet. Br. at 21, or chill the government's ability "to carry out its duty to protect the public fisc." Pet. Br. at 27. To the contrary, since an agency that acts unjustifiably will pay for the cost of litigation regardless of the conduct of its litigators, the way for those litigators to protect the public fisc is by advancing reasonable litigation positions on the underlying merits and thereby minimizing the need for, and the expense of, litigation "in the civil action."

Moreover, fees for fees, like the entire fee award, are subject to the statute's overarching reasonableness test. Nothing in the rule adopted by the court below precludes a court from reducing a fee request on the ground that it is not reasonable, as the cases awarding reduced fees cited by the government in its own brief illustrate. *See* Pet. Br. at 20 n.21. Similarly unavailing is the government's lament that under the rule adopted by the court below, it will be required to pay fees for fees "even though the government in fact prevailed" on certain issues before the Eleventh Circuit. Pet. Br. at 19-20. The government is deliberately obscuring the fact that the court of appeals affirmed an award of fees for fees for work performed before the *district court*—the amount of which was never challenged by the government.[28] On remand, the

28 "None of the fees [for fees], costs or expenses [were] challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing" and the district court expressly found the amount of the requests to be "reasonable." *Jean VIII*, Pet. App. at 85a.



government will be free to argue that it would not be reasonable within the meaning of the EAJA to award respondents fees incurred before the court of appeals (which are not part of the record before this Court), for time spent there litigating unsuccessful claims to attorney's fees.

The government also expresses concern for agencies with small appropriations which might find the possibility of large EAJA awards "particularly troubling." *See* Pet. Br. at 21 n.22. But this is not an argument against a reasonable award of fees for fees or a rule of substantial justification to be created by judicial fiat—it is an argument for repeal of the EAJA and has been expressly rejected:

> If the Attorney General has the guts to come in here and argue, as one of their representatives did in my office, "It's going to cost a lot of money,"—you ought to tell him: That proves the case. If it costs you a lot of money, it means your conduct has been excessive. And it ought to cost you money.
>
> I am sick and tired of people who get paid for by the taxpayers, running around thinking that they ought to be able to exercise their authority without having to respond to anybody.

*House Subcommittee Hearings on S.265*, *supra*, at 22 (remarks of Sen. Nelson).

Nor does the government's self-serving *a priori* argument from "judicial economy" find any basis in the statute or legislative history. The government asserts that the absence of substantial justification review of fees for fees will encourage excessive litigation by the prevailing party and discourage settlement. *See* Pet. Br. at 30-31. The simple fact is that the statute vests discretion to control the cost of litigation and any abusive behavior by a prevailing party in the court, not the government. The statute already contains explicit provisions for limiting a prevailing party's excesses in litigation by specifically providing for reduction or denial of an award for any portion of the litigation in which the prevailing party unreasonably protracts the litigation. *See* 28 U.S.C. § 2412

(d)(1)(C) and (d)(2)(D). Most tellingly, there is no evidence in the government's brief, or in the literature, to demonstrate that these explicit statutory safeguards are ineffective.[29]

Moreover, there is no evidence in the record of this case that the rule proposed by the government would in any way further the policies the government puts in issue, and certainly none to deal with the concern expressed in this Court's express admonition that a request for attorney's fees should "not result in a second major litigation." *Hensley v. Eckerhart*, *supra* at 437. Rather, the record demonstrates the prescience of this Court's *Hensley* concern and of the Second Circuit's vision of a " 'Kafkaesque judicial nightmare' of an infinite regression of suits to recover fees for fees and an assessment in each of whether the immediately previous government opposition was 'substantially justified.' " *Trichilo*, *supra*, at 708, *citing Cinciarelli v. Reagan*, 729 F.2d 801, 810 (D.C. Cir. 1984). Permitting the government to litigate the substantial justification it may have to each and every fee request, and each element thereof, stage by stage in lieu of use of the statutory tests for reasonableness will serve no purpose but to remove the statute's sole stricture on the government's litigation conduct: liability for the cost of the civil action arising from the unjustified agency action.

29 The government also makes a peculiar distinction between the cost of a fee application, which it concedes is reimbursable as part of litigation on the merits without a separate substantial justification test, and the cost of defending the fee application, which the government asserts is not. *See* Pet. Br. at 10-11 & n.11. The government states no conceptual basis for this distinction, but simply asserts that fees for defending an application are not necessary to the party's case because they will not exist if the government deems the request reasonable. *Id.* Thus, according to the government, a statute which has as its premise that the government will not act reasonably unless it is forced to pay leaves it to the government to determine how much it will pay.



## V. EAJA'S CONDITIONS ON AN AWARD ARE SUFFICIENT AND THE GOVERNMENT'S ALTERNATIVE RULE SHOULD BE REJECTED

Perhaps in recognition of the lack of any reasoned connection between its proposed rule on fees for fees and the language and legislative history of EAJA, the government floats a trial balloon as an alternative by suggesting that this Court adopt the rule stated in *Russell v. Heckler*, *supra*, at 155, which would preclude "substantial justification" review only where the sole claim in the fee litigation is that the government's position on the merits is not substantially justified. *Id.* As the government itself reluctantly admits, "the *Russell* rule is less securely grounded in the language and purpose of EAJA." Pet. Br. at 34. In fact, the *Russell* rule has no foundation whatever.[30]

The *Russell* rule, like the construction urged by petitioners before this Court, simply rewrites the definition of "position of the United States" contained in the statute and defies the plain meaning of the statute and the intent of Congress. "Position of the United States" refers to both the challenged agency action and the government's litigation position. 28 U.S.C. § 2412(d)(2)(D). Congress has expressly stated that a reasonable litigation position will not defeat a fee award if the agency action was not substantially justified. *See* Point II, *supra*. In derogation of this directive, the *Russell* rule would require a court to focus exclusively on the litigation position taken by the government in the fee litigation, thus effectively repealing the 1985 EAJA amendments—a course this Court should decline to follow. It is a well-established principle of this Court that "Congress is the body to amend

30 The *Russell* court undertook no analysis of the language or legislative history of EAJA, preferring to rely on the decision in *Lee v. Johnson*, 799 F.2d 31 (3d Cir. 1986). The *Lee* court similarly conducted no analysis of the statute, simply stating that EAJA "authorizes such recovery [of fees for fees] only in those instances in which the government's opposition to such award is not substantially justified." *Id.* at 39.

[a statute] and not this court." *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 340 (1897); *see also 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("our problem is to construe what Congress has written. After all, Congress expresses its purposes by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor distort.").

Furthermore, there is no policy served by this rule that is not more admirably and coherently served by the rule applied by the court of appeals below. As has already been set forth at length, the rule applied below serves the interest of judicial economy; it discourages all unreasonable government challenges to a fee application—not only those based on the government's position on the merits; and it incorporates all of EAJA's existing protections against excessive fee requests and unreasonable litigiousness on the part of an EAJA prevailing party.

## VI. THE GOVERNMENT HAS WAIVED SUBSTANTIAL JUSTIFICATION REVIEW OF RESPONDENTS' FEE APPLICATION

The government is requesting that this Court rule in its favor on an issue which it failed to press either legally or factually in the district court. It is small wonder then that petitioners' arguments are phrased in terms of hypothetical scenarios and imagined horribles.

Thus, although the government predicts dire consequences for the public fisc if the Eleventh Circuit ruling is permitted to stand (a prediction which, as demonstrated, is wholly baseless), it neglects to inform this Court that "[n]one of the fees [for fees], costs or expenses [were] challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing." *Jean VIII*, Pet. App. at 85a. Thus, even if the government were to prevail in this Court, on remand it would be precluded from disputing the *amount* of fees for fees awarded by the district court.



As to entitlement, the government has similarly waived its right to contest the award of fees for fees. The government has the burden of proving its position "had a reasonable basis both in law and fact." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in*, 1980 U.S. Code Cong. & Admin. News 4989; S. Rep. No. 253, *supra*, at 6. "Position," of course, refers to both the challenged underlying agency action and the government's litigation position. Here, the government failed to introduce any evidence whatever at the fee hearings, let alone evidence to support either the challenged agency action or the government's litigation posture as "substantially justified." Although the government did argue that fee litigation is subject to separate substantial justification review (*see* Pet. Rep. at 2), it never—despite being given the opportunity to do so—submitted any evidence or presented any arguments below to demonstrate that its position in the fee litigation was justified. Having waived the opportunity below, the government is thus inviting this Court to decide a hypothetical question—an invitation which should be declined. As a result, the issue on which certiorari was granted is not raised by the record, and the writ should therefore be dismissed as improvidently granted.

## CONCLUSION

Although the government strives mightily to recast the plain meaning and legislative intent of EAJA, this Court should be satisfied, as it was when it interpreted another provision of the statute, that "the text of the statute permits, and sound judicial administration counsels" affirmance of the decision below on the question on which certiorari was granted. *Pierce*, *supra* at 2549. Additionally, such a result

would "implement [this Court's] view that a 'request for attorney's fees should not result in a second major litigation.' " *Id.*, *quoting Hensley*, *supra* at 427.

Respectfully submitted,

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